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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0608-CR-663
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Judge Pro Tempore
Cause No. 49G03-0508-FA-146966

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Joshua Smith appeals his murder conviction. We affirm and remand with instructions to vacate the judgment of conviction on a class A felony battery count.

Issues

We restate the issue Smith raises as follows:

I. Whether the trial court committed reversible error in instructing the jury on the inherently included lesser offense of reckless homicide.

We address sua sponte the following issue:

II. Whether the trial court properly "merged" Smith's battery conviction with his murder conviction.

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that Smith lived in Indianapolis with his girlfriend, Jessica Oder, and her children, three-year-old K.O. and two-year-old J.O. On the morning of August 26, 2005, Oder woke up the children and fed them breakfast. J.O. gagged on the oatmeal, but Oder noticed nothing else unusual. Oder went to work, leaving the children in Smith's care. When Oder came home for lunch, the children seemed fine and were eating lunch. Oder returned to work, and when she came home at 5:00 p.m., she found the children playing in their room. When Oder left home at 6:00 to meet her sister at a Greenfield restaurant, both children seemed fine.

Oder left the restaurant around 9:45 p.m. When she arrived home, the house was empty. She called Smith, who told her that something was wrong with J.O. Smith said that J.O. "was just laying on the couch and went lifeless" and that he "didn't know" what was wrong. Tr. at 46. Smith told Oder to go to Methodist Hospital. When Oder arrived at the

hospital, J.O. was unconscious and hooked up to machines. Smith told the medical social worker that J.O. had vomited throughout the day and went limp after Smith fed him a hotdog for dinner.

J.O. was in a coma when he arrived at the hospital. Based on the information that Smith had given the social worker, the medical team initially looked for a hotdog in J.O.'s airway. They noticed, however, that one of J.O.'s pupils was abnormally large, which indicated a life-threatening brain stem herniation. Tests revealed that J.O. had suffered subdural hemorrhaging and severe cerebral edema. J.O.'s cortex was destroyed, rendering him unable to interact with his environment. As a result of the brain injury, J.O. had vomited into his lungs, which affected his breathing and blood oxygenation and significantly injured his liver. J.O. also suffered traumatic retinal hemorrhages that were consistent only with abusive head trauma resulting from a rapid acceleration/deceleration of the head. According to attending forensic pediatrician Dr. Antoinette Laskey, J.O.'s head trauma was not "consistent with routine handling, rough play, regular household accidents that toddlers can get themselves into." *Id*. at 116. Hospital staff told Oder that J.O. "probably would never see again" and "would be a vegetable." *Id*. at 49. Oder decided to take J.O. off life support. Dr. Laskey opined that J.O.'s death was caused by sustaining "an abusive head injury at the hands of a caregiver." *Id*. at 125.

The State initially charged Smith with class A felony battery and later added a murder charge. On June 20, 2006, a jury found Smith guilty as charged. The trial court entered judgment of conviction on both counts. At a sentencing hearing on July 14, 2006, the trial

court purported to "merge" the battery conviction with the murder conviction and sentenced Smith to forty-five years for murder.

Discussion and Decision

I. Reckless Homicide Instruction

Murder is the knowing or intentional killing of another human being. Ind. Code § 35-42-1-1. In the amended charging information, the State alleged that Smith knowingly killed J.O. by "violently shaking" him. Appellant's App. at 42. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b). The final jury instruction defining murder provides in pertinent part that the State must prove beyond a reasonable doubt that Smith knowingly killed J.O. by "violently shaking" him. Appellant's App. at 124.

The trial court also instructed the jury on the inherently included lesser offense of reckless homicide, which is the reckless killing of another human being. Ind. Code § 35-42-1-5; *see also Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) (stating that reckless homicide is an inherently included lesser offense of murder). "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." Ind. Code § 35-41-2-2(d). The final jury instruction defining reckless homicide provides in pertinent part that the State must prove beyond a reasonable doubt that Smith recklessly killed J.O. by "violently shaking" him. Appellant's App. at 125. As previously mentioned, the jury found Smith guilty of murder and therefore did not return a verdict on reckless homicide.

On appeal, Smith contends that the trial court erred in giving the reckless homicide instruction to the jury based on the inclusion of the phrase "violently shaking." "The manner of instructing a jury is left to the sound discretion of the trial court. Its ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury." *Patton v. State*, 837, N.E.2d 576, 579 (Ind. Ct. App. 2005) (citation omitted). "Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights." *Id*

"Appellate review of a claim of error in the giving of a jury instruction requires a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objection." *Id*. In his appellate brief, Smith states that his counsel "voiced some concern" about the wording of the reckless homicide instruction. Appellant's Br. at 6. That colloquy reads as follows:

> [Defense counsel]: You know what bothers me about that is - - is "by violently shaking".
>
> THE COURT: Well, that's the - - that's what they would have to prove, or that - - it says here.
>
> [Defense counsel]: Well, by - -
>
> THE COURT: Well, then you define "reckless" as following - -
>
> [Defense counsel]: Well, I think that limits them to - - they could conceivably find out he didn't shake, but he did something else that constitutes.
>
> THE COURT: All right. Give me the State's opinion on that, please. You're the one that has the burden of proof.
>
> [Defense counsel]: I mean, I don't know.

[Prosecutor]: Right.

[Defense counsel]: I don't want to help them out any more than I have to.

[Prosecutor]: I mean, it's - - I mean, my take on it is, it's my charging information, and they can't change the wording of it.

THE COURT: Yes, that's what I'm saying.

[Defense co-counsel]: Okay.

THE COURT: I[t] would appear to me that that's the State's burden.

[Defense counsel]: All right.

THE COURT: If they don't object to it, I'm not going to - -

[Prosecutor]: So - -

THE COURT: Okay. And then I'm going to use the definition of "reckless homicide".

Tr. at 246-47 (typography altered).

Assuming, without deciding, that Smith's counsel's expression of "concern" is a specific objection sufficient to preserve a claim of error, we conclude that he has failed to establish that any error merits reversal. Smith reframes his argument on appeal as follows: "In this case, the adverb 'violently' was unnecessary to the cause of death. The mens rea in this charge is 'reckless.' Mr. Smith would be guilty of this count if he recklessly caused death by shaking, regardless of whether the shake was violent." Appellant's Br. at 8.[1] We agree with the State that the inclusion of the phrase "violently shaking" did not prejudice

Smith; "if anything, it made the State's burden of proof higher because rather than simply proving [that Smith] 'shook' the victim, it had to prove that [Smith] 'violently shook' the victim." Appellee's Br. at 6. Both the murder and the reckless homicide instructions contained the phrase "violently shaking"; obviously, the jury found that the State proved beyond a reasonable doubt that Smith acted knowingly, rather than recklessly, in killing J.O. by violently shaking him. In sum, we find no grounds for reversal and affirm Smith's murder conviction.

II. "Merger" of Battery and Murder Convictions

As previously mentioned, the trial court entered judgment of conviction on both the battery and the murder counts after the jury rendered its verdict. At sentencing, the court purported to "merge" the battery conviction with the murder conviction, presumably on double jeopardy grounds. Our supreme court has stated that "a defendant's constitutional rights are violated when a court enters judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count." *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006). The proper remedy here is to vacate, rather then merge, the judgment of conviction on the battery count. *Cf. id*. ("Where the court merges the lesser-included offense *without* imposing judgment, there is no need to remand on appeal to 'vacate.'") (emphasis added). We therefore remand with instructions to do so.

Affirmed and remanded.

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[1] Smith further argues that his "defense was that he did not meant to do any harm and his play with the child was never violent. Mr. Smith is entitled to have the jury instructed on this theory of his defense." Appellant's Br. at 7-8. Smith's objection at trial cannot be construed to encompass this argument. "A defendant may not argue one ground for objection at trial and then raise new grounds on appeal." *Patton*, 837 N.E.2d at 579. As such, this argument is waived.

SULLIVAN, J., and SHARPNACK, J., concur.